

Input Paper

# 4<sup>th</sup> Railway Package Governance proposal

ERFA input to the Land Transport Working Party meeting on 8th September 2015

3rd September 2015

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In reforming the management of railways across the EU priority must be given to making rail a more attractive transport mode both for customers and for investment in the sector. Provisions that allow anti-competitive behaviour harm the quality of existing rail services as well as deter new investment into the rail sector. They are counter-productive to inducing growth for an environmentally sustainable mode of transport in Europe.

With this in mind ERFA, representing new entrants on the rail market, draws attention to provisions in the latest version of the Luxembourg Presidency text that would continue to facilitate anti-competitive behaviour in the rail sector. ERFA seeks changes that will breathe new life into a sector that is still failing to meet the quality expectations of current and potential customers.

**Contact:**

ERFA European Railway Association  
Julia Lamb, Secretary General  
T +32.2.513.60.87, julia.lamb@erfarail.eu

## **Independence of essential functions – Article 7a**

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**ERFA seeks assurances that the functions for which the IM is held responsible, in line with Article 7, paragraph 1 (i.e operation, maintenance and development of the rail infrastructure) are carried out independently of any RU.**

**This is a critical condition for a competitive rail system and for attracting investment to rail. A new operator will think twice about investing in rail services if its access to the infrastructure can be jeopardised by a competing rail operator's interests.**

ERFA welcomes the provision of Article 7a, paragraph 1 ensuring that the “IM has organisational and decision-making independence ... as regards the essential functions.”

However this provision is fundamentally undermined by paragraph 2 of the same article, which allows a railway undertaking to exercise influence on the infrastructure manager in relation to the essential functions and on appointments and dismissals of persons in charge of taking decisions on the essential functions.

A railway undertaking that can influence the path allocation of a competitor distorts competition and the level playing field. There is also no justification for a railway undertaking to interfere in human resources issues, as a result of not getting the path allocation it wants.

- ERFA's suggested amendments are the following:

### Article 7a, paragraph 2

- a railway undertaking or any other legal undertaking does not exercise a ~~decisive~~ influence on the infrastructure manager in relation to the essential functions....”

Article 7a, paragraph 2 second indent should be deleted.

- ~~— a railway undertaking has no decisive influence on appointments and dismissals of persons in charge of taking decisions on essential functions.~~

## Article 7b, Impartiality of the infrastructure manager in respect of traffic management and maintenance planning

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The functions of traffic management and maintenance planning are services that are critical for the users of the rail infrastructure. Anti-competitive behaviour must be eliminated from the provision of these services.

- ERFA proposes the following amendment to stress the impartiality angle

Article 7b, paragraph 1

The functions of traffic management and maintenance planning shall be exercised in an ***independent***, transparent and non-discriminatory manner

- ERFA proposes the following deletion

Article 7b, paragraph 2

~~Where the infrastructure manager grants further access to the traffic management process, it shall do so in a transparent and non-discriminatory way.~~

When there is a disruption on the network it is clear that RUs should receive full and timely access to relevant information. However ERFA does not wish “further access” to interfere with the responsibility of the IM to effectively deal with traffic management issues. It is unclear what is meant by the reference to “further access to the traffic management process.”

## Entrusting (outsourcing) and sharing the infrastructure manager’s functions, Article 7c, paragraph 1

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**Member States have existing legal obligations to reduce the costs of infrastructure management, to reduce track access charges (Directive 2012/34/EU, Article 30, paragraph 1) and to improve performance of the infrastructure (Directive 2012/34/EU, Article 8, paragraph 3, Article 30, paragraph 2 and Annex V).**

**ERFA underlines that management of rail infrastructure must be in line with delivering strong performance and efficient services for the users of the rail network.**

The outsourcing (entrusting) of IM functions can play a role in improving performance and increasing efficiency in the management of the network, on the condition that:

- the independence of the entity providing the service is guaranteed
- the performance targets of the IM are met
- efficiency gains are not lost via a fragmented IM business model

These conditions are not currently fully reflected in the Luxembourg Presidency text. ERFA proposes the following changes:

### **Outsourcing, not entrusting**

Outsourcing refers to a contractual relationship between the IM and the entity to which it is giving the responsibility for the execution of a function. ERFA prefers the reference to a contractual relationship, so that it is clear that services are being exchanged for payment.

- ERFA advocates the following amendment

Article 7c, paragraph 1, points a and b

***Outsource*** ~~entrust~~ functions....

### **Open and transparent competitive tendering for outsourcing of functions**

If a function related to the management of the infrastructure is assigned to the responsibility of another entity, the function should be allocated following an open and transparent competitive tender procedure.

This has the advantage of aligning the outsourcing of IM functions with the existing legal obligation for the infrastructure manager to bring down costs of the infrastructure management and track access charges (Recast Directive (2012/34/EU), Article 30, paragraph 1).

- ERFA advocates the following amendments

Article 7c, paragraph 1

Provided that no conflicts of interest arise and the confidentiality of commercially sensitive information is guaranteed, the infrastructure manager may, ***subject to an open and transparent competitive tender:***

Article 7c, paragraph 1, (new)

***The competitive tender for the outsourcing of functions shall be monitored by the regulatory body***

### **Independence**

- To avoid conflicts of interest in the entrusting of functions to different entities, ERFA proposes the following clarification:

Article 7c, paragraph 1, point a

- (a) entrust functions to a different entity, provided the latter is neither a railway undertaking, nor controls a railway undertaking, nor is *indirectly or directly* controlled by a railway undertaking.

#### **No outsourcing to railway undertakings**

- To avoid obvious conflicts of interest in the entrusting of certain IM functions to railway undertakings ERFA proposes the following deletion:

Article 7c, paragraph 1, point b

~~***(b) entrust the development and maintenance of the railway infrastructure to railway undertakings***~~

ERFA opposes the entrusting of maintenance and development functions to railway undertakings. Conflicts of interest will harm the ability of RUs to deliver maintenance and development work in line with optimising the performance of the rail system. An RU's principle business, in line with the existing legal definition, is to provide services for the transport of goods and/or passengers by rail. An RU takes care of the performance of its own business interests, which diverges from the responsibility of managing the infrastructure to ensure the performance of the whole network and for all users.

#### **No dilution of performance targets**

- To ensure the entrusting of IM functions does not dilute performance targets of infrastructure management, ERFA proposes the following amendment:

Article 7c, paragraph 1

The infrastructure manager shall keep the supervisory power over and remain ultimately ***responsible*** for the exercise ***and performance*** of functions.

It is important for the users of the rail network that the IM retains the ultimately responsibility for the IM functions, not just when problems occur. With this in mind "responsibility" and not "accountability" is the correct term.

In view of existing legal obligations to improve the performance of the infrastructure manager, it is important that the IM remains ultimately responsible for meeting these requirements. That means the IM should have ultimate responsibility over the functions that impact on its performance and financial plans.

This would align the text with existing EU legislation, where the IM is given the responsibility to manage the infrastructure via a contractual agreement from the Member State, which includes performance targets and where the IM produces a business plan outlining investment and development programmes, which must be designed to ensure optimal and efficient use, provision and development of the infrastructure.

## Cooperation agreements, Article 7c, paragraph 3

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ERFA continues to have strong reservations regarding the value of cooperation agreements in a competitive rail system. ERFA does not oppose practical arrangements for enhancing the performance of the rail system, but believes that the benefits of such arrangements need to be balanced with their potential for anti-competitive behaviour.

- ERFA suggested amendments

The one example of a cooperation agreement given in the text (Article 7c, paragraph 3), the leasing of a service facility, is not a cooperation agreement. It is an already existing legal provision (Recast Directive, Article 13).

ERFA proposes the deletion of this reference.

Article 7c, paragraph 3

~~*Such arrangements may include leasing a service facility to a railway undertaking or operation of a service facility, in compliance with the requirements of Article 13.*~~

- ERFA suggested amendments

To give legal clarity to the term cooperation agreement, ERFA wishes to see included in the legislation an exhaustive list (which does not include already existing legal provisions) for circumstances under which a cooperation agreement would be appropriate.

Article 7c, paragraph 3, new

***A cooperation agreement means the following type of arrangement***

***Example A.....***

***Example B.....***

***etc***

Furthermore if, as stated in the latest version of the compromise, cooperation agreements are to deliver benefits to customers such as via reduced costs or improved performance, ERFA wishes to see safeguards put in place to guarantee these stated objectives.

Article 7c, paragraph 3, point a (new)

***(a)The regulatory body shall give prior-approval to cooperation agreements.***

Article 7c, paragraph 3, point b (new)

*(b) The delivery of benefits to customers from cooperation agreements shall be monitored by the regulatory body.*

Article 7c, paragraph 3, point c (new)

*(c) Reduced costs to customers shall be understood to mean either reduced prices charged to passengers/customers or a reduction in the taxpayers' contribution to the funding of the public service contract or a reduction in the taxpayers contribution to the funding of the infrastructure management.*

Article 7c, paragraph 3, point d (new)

*(d) Improved performance shall be monitored by the regulatory body against the following performance targets.*

*Punctuality of services*

*Frequency of train operations*

*Customer satisfaction*

*Quality of rolling stock*

*Transport capacity for passengers/ freight*

*Efficiency of transport service provision*

Article 7c, paragraph 3, point e (new)

*(e) The benefits of cooperation agreements for customers shall be made available in the public domain.*

## **Financial Transparency**

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**ERFA stresses the need for the rules on financial transparency to be tightened up with a view to preventing anti-competitive behaviour and attracting new investors to the sector.**

With this in mind ERFA seeks to close the loophole in Article 7d ( bb) which allows infrastructure managers to raise funds on the capital markets for individual railway undertakings operating on the network it does not manage.

This allows infrastructure managers, who have subsidiaries operating in other Member States, to raise funds on the capital markets, potentially giving their RUs a competitive advantage on markets outside of their home territory.

- ERFA suggested amendment:

(bb) The infrastructure manager may not raise funds on the capital markets for individual railway undertakings *operating on the network it manages*.

ERFA also seeks to close a further provision that would continue to apply the full financial transparency requirements to all infrastructure managers.

- ERFA suggested amendment

Article 2, paragraph 9

*This Directive shall not apply to undertakings the business of which is limited to providing solely shuttle services for road vehicles through undersea tunnels or to transport operations in the form of shuttle services for road vehicles through such tunnels except Article 6(1) and (4) and articles 7d, 10, 11, 12 and 28*

## Coordination Committee

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ERFA continues to support the establishment of coordination platforms between the users and stakeholders of the rail network, in an open, transparent and inclusive format.

The management of the rail infrastructure does not exist in a vacuum – it needs to be in communication with its users, customers and local/regional authorities in order to pool resources and efforts to improve rail's performance.

To ensure the involvement and engagement of all parties involved in the dialogue ERFA advocates that the coordination committee is given an advisory role to the infrastructure manager, that it has the power to request relevant information from the IM in order to carry out its advisory tasks effectively and the ability to draw up an annual report.

- ERFA suggested amendments  
The reinstatement of coordination committees:

Article 7e ***Coordination Committees***

- ERFA suggested amendments

Article 7e, paragraph 2 (new) ***Coordination Committees may make proposals concerning or advising the infrastructure manager. The Coordination Committees shall draw up an annual report outlining any proposals made and shall submit such a report to the infrastructure***



*manager, the Member State and the regulatory body concerned. The annual report shall be made publicly available.*

➤ ERFA suggested amendments

In view of the possibility of infrastructure managers to entrust their various functions, ERFA also proposes an additional change:

Article 7e, new paragraph

*Upon request the independent bodies or the bodies, to which the infrastructure management functions are entrusted, participate in the meetings of the coordination committee*